Supreme Court, U.S.
FILED
MAR 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1269

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

MARCH FONG EU, Secretary of State of the State of California; JOHN K. VAN DE KAMP, Attorney General of the State of California; ARLO SMITH, District Attorney of San Francisco County; and LEO HIMMELSBACH, District Attorney of Santa Clara County,

Appellants,

v.

SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE; SAN FRANCISCO COUNTY REPUBLICAN CENTRAL COMMITTEE; LOS ANGELES COUNTY DEMOCRATIC CENTRAL COMMITTEE; ALAMEDA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SANTA CLARA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SOLANO COUNTY DEMOCRATIC CENTRAL COMMITTEE; PLACER COUNTY DEMOCRATIC CENTRAL COMMITTEE; STATE CENTRAL COMMITTEE OF THE LIBERTARIAN PARTY OF CALIFORNIA; BERT COFFEY; NANCY WALKER; LINDA POST; DOLPH ANDREWS; CAROLYN WALLACE; MARY KING; THOMAS ROMERO; MARY GINGELL; DAVID E. STURROCK; WALTER LAYSON; MARY VAIL; ROY CHRISTMAN; JAMES FAY; NORTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; SOUTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; and NATIONAL COMMITTEE FOR PARTY RENEWAL,

Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

MOTION TO AFFIRM OR TO DISMISS

JAMES J. BROSNAHAN*
CEDRIC C. CHAO
PAUL FLUM
MORRISON & FOERSTER
345 California Street
San Francisco, CA 94104- 2105
(415) 434-7000
Attorneys for Appellees
* Denotes Counsel of Record

QUESTIONS PRESENTED

1. Do state laws prohibiting political parties from endorsing candidates in primary elections and prescribing the composition of the parties' governing bodies substantially burden the parties' first amendment rights?

2. Does a state have a compelling interest in preventing a political party from engaging in a course of conduct that the state views as contrary to the party's best interests?

3. Does a state's interest in judicial enforcement of rules for internal party governance justify statutes prescribing the content of those rules?

4. Does a state's interest in the orderly conduct of general election campaigns justify a ban on primary election endorsements by political parties?

5. Is state regulation of political parties equivalent to self-governance for purposes of assessing whether the parties' first amendment rights are substantially burdened?

6. May a state restrict the exercise of a political party's first amendment rights on the ground that candidates for elective office can disaffiliate from the party and qualify for the general election ballot as independent candidates?

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

THE DECISION BELOW CORRECTLY HELD THAT THE CHALLENGED STATUTES UNCONSTITUTIONALLY INFRINGE PLAINTIFFS' RIGHTS OF POLITICAL EXPRESSION AND ASSOCIATION 6

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL 10

A. The Purported Absence of a Conflict Between the Parties' Bylaws and the Challenged Elections Code Provisions Is Immaterial 11

1. Plaintiffs' Uncontroverted Declarations Demonstrated that California Political Parties Are Opposed to Elections Code Regulation 11

2. California Political Parties Have Adopted New Rules that Depart from the Invalidated Elections Code Provisions 13

3. California's Asserted Interest in Judicial Enforcement of Political Party Rules Is Not a Sufficient Justification for Regulating the Content of those Rules 15

B. California's Asserted Interest in Promoting the Stability of Its Governmental System Does Not Justify the Challenged Restrictions on Political Parties' Speech and Internal Governance 16

C. Providing Ballot Access to Candidates Who Do Not Participate in the State-Run Primary Does Not Lessen the Burden Imposed by Elections Code Regulation of Ballot-Qualified Parties 19

CONCLUSION 21

TABLE OF AUTHORITIES

Cases Page

Abrams v. *Reno*, 452 F. Supp. 1166 (S.D. Fla. 1978), *aff'd*, 649 F.2d 342 (5th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982) 7
American Party of Texas v. *White*, 415 U.S. 767 (1974) 16
Buckley v. *Valeo*, 424 U.S. 1 (1976) 6
Consolidated Edison Company of New York v. *Public Service Commission*, 447 U.S. 530 (1980) 9
Cousins v. *Wigoda*, 419 U.S. 477 (1975) 6
Democratic Party of the United States v. *Wisconsin*, 450 U.S. 107 (1981) 6, 16
Fahey v. *Darigan*, 405 F. Supp. 1386 (D.R.I. 1975) 7
Kusper v. *Pontikes*, 414 U.S. 51 (1973) 8
Martin-Trigona v. *Dunne*, 425 F. Supp. 813 (N.D. Ill. 1977) 7
Republican Party of Connecticut v. *Tashjian*, 770 F.2d 265 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986) 7
Ripon Society, Inc. v. *National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (*en banc*),*cert. denied*, 424 U.S. 933 (1976) 7, 16
Smith v. *Allwright*, 321 U.S. 649 (1944) 16
Storer v. *Brown*, 415 U.S. 724 (1974) 16
Tashjian v. *Republican Party of Connecticut*, ___ U.S. ___, 107 S. Ct. 544 (1986) .....*passim*
Unger v. *Superior Court*, 37 Cal. 3d 612, 692 P.2d 238, 209 Cal. Rptr. 474 (1984) 2 n.1

Page

Constitutions, Rules, and Statutes

Session Laws

1961 Cal. Stat. 23 ..... 8 n.6
1963 Cal. Stat. 1108 ..... 8 n.6

California Elections Code

§ 6430(a) 20
§ 6490 20
§§ 6830-6920 20
§ 6830(c) 19, 20
§ 8500 ..... 5 n.4, 8 n.6
§ 8660 ..... 5 n.4
§ 8661 ..... 5 n.4
§§ 8663-8665 ..... 5 n.4
§ 8667 ..... 5 n.4
§ 8669 ..... 5 n.4
§ 9000 ..... 19, 20
§ 9160 ..... 5 n.4
§ 9160.5 ..... 5 n.4
§ 9161 ..... 5 n.4
§ 9161.5 ..... 5 n.4
§ 9162 ..... 5 n.4
§ 9163 ..... 5 n.4
§ 9164 ..... 5 n.4
§ 9274 ..... 5 n.4
§ 9600 20
§ 9750 20
§ 9816 ..... 5 n.4
§ 9955 20
§ 10210 20
§ 11702 ..... 2, 5 n.4, 8 n.6, 20
§ 29102 ..... 3, 5 n.4
§ 29430 ..... 3, 5 n.4

Other Authorities

Note, *Developments in the Law — Elections*, 88 Harv. L. Rev. 1111 (1975) 7

Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods*, 57 S. Cal. L. Rev. 213 (1984) 7

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No. 87-1269

MARCH FONG EU, Secretary of State of the State of California; JOHN K. VAN DE KAMP, Attorney General of the State of California; ARLO SMITH, District Attorney of San Francisco County; and LEO HIMMELSBACH, District Attorney of Santa Clara County,

Appellants,

v.

SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE; SAN FRANCISCO COUNTY REPUBLICAN CENTRAL COMMITTEE; LOS ANGELES COUNTY DEMOCRATIC CENTRAL COMMITTEE; ALAMEDA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SANTA CLARA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SOLANO COUNTY DEMOCRATIC CENTRAL COMMITTEE; PLACER COUNTY DEMOCRATIC CENTRAL COMMITTEE; STATE CENTRAL COMMITTEE OF THE LIBERTARIAN PARTY OF CALIFORNIA; BERT COFFEY; NANCY WALKER; LINDA POST; DOLPH ANDREWS; CAROLYN WALLACE; MARY KING; THOMAS ROMERO; MARY GINGELL; DAVID E. STURROCK; WALTER LAYSON; MARY VAIL; ROY CHRISTMAN; JAMES FAY; NORTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; SOUTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; and NATIONAL COMMITTEE FOR PARTY RENEWAL,

Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

---

MOTION TO AFFIRM OR TO DISMISS

STATEMENT OF THE CASE

By this motion, appellees respectfully request this Court summarily to affirm the decision below, or to dismiss this appeal for lack of a substantial federal question.

Appellees are seven county central committees of the California Democratic and Republican parties and their chairs, the state central committee of the California Libertarian party and its chair, and other organizations and individuals active in California politics. All appellees are named in the caption. Appellees were plaintiffs below in an action filed in the United States District Court for the Northern District of California on November 17, 1983, seeking declaratory and injunctive relief to secure their first amendment rights. A first amended complaint was filed on December 5, 1983. Appellants answered on December 15 and 16, 1983.

The first amended complaint contained three causes of action, two of which are presented on this appeal.[1] By their first cause of action, plaintiffs sought the right to endorse, support, or oppose candidates for nomination in direct party primary elections. They were prohibited from doing so under California Elections Code section 11702, enacted in 1963, which provides that the "state convention, state central committee, and the county central committee in each county shall not endorse,

---

1 The District Court abstained on the second cause of action, which challenged state law restrictions on the right of political parties to endorse candidates in nonpartisan school, county or municipal office elections, in light of the pendency in the California Supreme Court of an appeal presenting similar issues. The California Supreme Court ultimately decided that state law did not prohibit such endorsements. *Unger v. Superior Court*, 37 Cal. 3d 612, 692 P.2d 238, 209 Cal. Rptr. 474 (1984). A ban on nonpartisan endorsements was subsequently proposed by the State Legislature and enacted by ballot initiative in June 1986.

support, or oppose, any candidate for nomination by that party for partisan office in the direct primary election" (II App. 302a).[2] In addition to the statutory restriction on endorsements, Elections Code section 29430 makes it a misdemeanor for any person to "claim . . . on . . . behalf [of a candidate for nomination of a political party for partisan office] that he or she is the official candidate or the officially endorsed candidate of such political party" (II App. 303a). These restrictions on preprimary endorsements are unique to California (I App. 45a).

By their third cause of action, plaintiffs sought the right to structure and conduct their internal political party affairs without intrusive and burdensome state interference. Among other restrictions challenged in the third cause of action are Elections Code provisions governing the composition and method of selection of the state central committees, and the length of the state central committee chairperson's term of office (II App. 277a-280a). Violations of these provisions are also subject to criminal prosecution. Cal. Elec. Code § 29102 (II App. 303a).

Plaintiffs contended below that these various state laws substantially burdened their first amendment rights of political expression and association. Because there were no compelling state interests justifying this substantial burden, these state laws were alleged to violate the first amendment.

On February 27, 1984, the District Court set the date for oral argument on cross-motions for summary judgment and a motion to dismiss that the parties indicated they intended to file. The competing motions were fully briefed and argued. In support of summary judgment, plaintiffs filed 28 declarations from the

---

2 As used herein "I App." refers to Volume I of the Appendix to the Jurisdictional Statement, "II App." refers to Volume II of the Appendix to the Jurisdictional Statement, "Add." refers to the Addendum to Appellee's Motion to Affirm or to Dismiss filed herewith under separate cover, and "Juris. Stmt." refers to appellants' Jurisdictional Statement.

then-party chairs of each plaintiff central committee, prominent political scientists, and politicians within and without California.[3] Plaintiffs' declarations detailed the substantial burdens the challenged statutes placed upon plaintiffs' first amendment rights. These declarations established that the challenged Elections Code provisions have prevented political parties from developing effective leadership, have led to weakened party organizations, have deprived the electorate of valuable sources of information on primary candidates' qualifications, and have engendered serious voter confusion by preventing political parties from disavowing the views of organizations and candidates purporting incorrectly to represent the silenced parties' views. Plaintiffs' declarations established beyond doubt that plaintiff central committees would reform procedures for internal party governance and would endorse candidates in primary elections if permitted to do so.

Appellants, in opposition to summary judgment and in support of their cross-motion for summary judgment, submitted only one declaration — from Albert Rodda — that purported to address the first amendment issues (II App. 105a). As both the District Court and the Court of Appeals noted, "this affidavit consists of 'opinions . . . not based on facts, but on speculations'" (I App. 43a). The Rodda declaration failed to controvert plaintiffs' numerous declarations describing the impact that the challenged Elections Code provisions have on political parties (*id.* at 44a).

The District Court granted summary judgment for plaintiffs on April 9, 1984, as to the first cause of action and those portions of the third cause of action involving Elections Code

---

3 Plaintiffs' declarations are cited extensively in the Court of Appeals' opinion (*see* I App. 1a). Representative declarations are reproduced as Addenda A-K to this motion.

regulation of the selection of state central committee members and the terms of state central committee chairs.[4]

The merits of the case were thereafter fully briefed six times in the Court of Appeals — first, on appellants' emergency motion for a stay of judgment pending appeal, which was granted on April 24, 1984; second, immediately prior to oral argument, which was held on May 15, 1984; third, pursuant to the Court of Appeals' Order dated August 5, 1985, requesting supplemental briefs on the first amendment issues presented on appeal; fourth, following remand from this Court for reconsideration in light of *Tashjian v. Connecticut;* fifth, on appellants' motion for rehearing and suggestion for rehearing *en banc* of the Court of Appeals' August 18, 1987 opinion reaffirming the entry of summary judgment;[5] and sixth, on appellants' motion to stay issuance of mandate pending disposition of this appeal. The record on summary judgment has twice been subjected to probing review *de novo* by the Court of Appeals in the course of that process. At each juncture, the Court of Appeals concluded that the challenged Elections Code provisions substantially burden appellees' first amendment rights and that appellants have failed to show a compelling state interest in defense of the challenged statutes.

---

4 The District Court granted plaintiffs' motion as to California Elections Code sections 8660, 8661, 8663-8665, 8667, 8669, 9160, 9160.5, 9161, 9161.5, 9162, 9163, and 9164, relating to the selection of state central committee members, sections 9274 and 9816, relating to the terms of the state central committee chairs, section 11702, restricting endorsements in partisan primary elections, and sections 29102 and 29430, imposing criminal sanctions for violations of these provisions (II App. 69a-70a).

5 The petition for rehearing was unanimously denied on October 29, 1987. The full court was advised of appellants' suggestion for rehearing *en banc* and no judge requested a vote on the suggestion for rehearing *en banc* (I App. 5a).

Following the Court of Appeals' denial on November 17, 1987 (I App. 61a) of appellants' motion to stay issuance of mandate, Justice O'Connor denied appellants' application to stay mandate pending this appeal. Mandate issued on December 1, 1987. At their annual conventions held, respectively, in February and March 1988, the California Democratic and Libertarian Parties issued endorsements of candidates competing in the June 1988 primary elections (Add. Q at 92a; Add. P at 90a). At its annual convention held in February 1988, the California Republican Party amended its bylaws to repeal Elections Code restrictions on the composition and selection of its State Central Committee (Add. O at 72a).

THE DECISION BELOW CORRECTLY HELD THAT THE CHALLENGED STATUTES UNCONSTITUTIONALLY INFRINGE PLAINTIFFS' RIGHTS OF POLITICAL EXPRESSION AND ASSOCIATION

The decision below involves a straightforward application of settled constitutional principles and is wholly consistent with the recent decisions of this Court and the lower federal courts addressing the first amendment rights of political parties, including this Court's decision in *Tashjian v. Republican Party of Connecticut*, ___ U.S. ___, 107 S. Ct. 544 (1986). This Court has long held that political parties and their adherents "enjoy a constitutionally protected right of political association." *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975). *Accord Democratic Party of the United States v. Wisconsin*, 450 U.S. 107, 120-24 (1981); *Tashjian*, 107 S. Ct. at 548-49. It is equally well-established that "[a]dvocacy of the election or defeat of candidates . . . is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." *Buckley v. Valeo*, 424 U.S. 1, 48 (1976).

The lower federal courts have consistently struck down legislation that substantially burdens the exercise of first amendment rights by state and local political parties. *See*

Republican Party of Connecticut v. Tashjian, 770 F.2d 265 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986); *Abrams v. Reno*, 452 F. Supp. 1166 (S.D. Fla. 1978), *aff'd*, 649 F.2d 342 (5th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 424 U.S. 933 (1976); *Martin-Trigona v. Dunne*, 425 F. Supp. 813 (N.D. Ill. 1977); *Fahey v. Darigan*, 405 F. Supp. 1386 (D.R.I. 1975). *See generally* Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods*, 57 S. Cal. L. Rev. 213 (1984); Note, *Developments in the Law – Elections*, 88 Harv. L. Rev. 1111 (1975).

The record before the District Court established that the challenged Elections Code provisions substantially burden plaintiffs' first amendment rights. Plaintiffs' uncontroverted declarations highlighted the debilitating effects of Elections Code regulation of official party organizations. As those declarations showed, the complained-of statutes have prevented the parties from educating the public regarding the candidates' positions on the issues and have engendered serious voter confusion (*see, e.g.*, Christman Dec. ¶¶ 6, 9-10, Add. A at 3a-4a, 5a; King Dec. ¶ 5, Add. G at 38a; Post Dec. ¶¶ 6, 9-10, Add. I at 47a-48a, 49a-50a; Romero Dec. ¶ 4, Add. K at 57a-58a). For example, stripped of the power to endorse or oppose primary candidates, the Democratic party was rendered impotent in the face of a primary campaign by a former Ku Klux Klan Grand Dragon whose views were antithetical to those of the Democratic party; this candidate sought and obtained that party's nomination for Congress (Constantini Dec. ¶ 2, Add. C at 15a). By the same token, these restrictions have precluded the parties from recruiting or developing candidates for office, and have severely hindered their ability to attract talented and interested people (*see, e.g.*, Coffey Dec. ¶¶ 2-3, Add. B at 10a-11a; King Dec. ¶

6, Add. G at 38a-39a; Supp. Layson Dec. ¶¶ 4-6, Add. H at 43a-44a).[6]

Based on these and other uncontroverted affidavits submitted below, the Court of Appeals found that "by excluding the committees from the process of choosing party nominees, 'a basic function of a political party in [our system],' *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973), the state has effectively drained party central committees of political power" (I App. 15a). Similarly, the Court of Appeals found that restrictions on party governance had created "rigid organization[s] incapable of adjusting and responding to changing conditions" (I App. 31a). The result has been that "the parties have become weak and fossilized" (II App. 32a).

Where, as here, a statute restricts fundamental first amendment rights, the decisions of this Court hold that it may be sustained only if the government shows that the restriction "is a

---

6 Appellants misleadingly suggest (Juris. Stmt. 13 n.2) that the District Court erred in failing to allow discovery regarding the "role played by the parties in enacting" the challenged Elections Code provisions. The Elections Code provisions challenged below were enacted, for the most part, in the early 1960s. *See, e.g.*, 1963 Cal. Stat. 1108 (enacting Cal. Elec. Code § 11702); 1961 Cal. Stat. 23 (enacting Cal. Elec. Code § 8660). Counsel's declaration under Rule 56(f) of the Federal Rules of Civil Procedure was limited to discovery regarding plaintiffs' authority to bring suit and "written communications *within the past five years* . . . regarding the issues raised in this litigation" (Graybill Dec. Ex. A at pp. 1-2, II App. 120a-121a) (emphasis added). On its face, that declaration was not calculated to lead to the discovery of California political parties' historical position with respect to the challenged Elections Code provisions.

To the extent that appellants sought discovery regarding plaintiffs' authority to bring suit, both the District Court and the Court of Appeals held that the authorization issue had been waived (I App. 19a n.17; II App. 75a). The District Court nevertheless made an express finding that "the plaintiff central committees and each of them have authorization and capacity to bring and maintain this action" (II App. 76a). Appellants have apparently abandoned the authorization issue in their appeal to this Court.

precisely drawn means of serving a compelling state interest." *Consolidated Edison Company of New York v. Public Service Commission*, 447 U.S. 530, 540 (1980). *Accord Tashjian*, 107 S. Ct. at 550 (challenged statute must be "narrowly tailored regulation which advances the State's compelling interests"). The Court of Appeals, in affirming the District Court's entry of summary judgment, correctly held that appellants had failed to carry their burden of showing that the challenged Elections Code provisions were necessary to further a compelling state interest.

As the Court of Appeals noted, appellants advanced two justifications for the challenged statutory scheme: (1) the asserted need to avoid intraparty "factionalism" in order to preserve "strong" parties to run their candidates' general election campaigns (I App. 34a, 46a); and (2) the asserted need to protect primary voters from "confusion" and "undue influence" from the party leadership (*id.* at 49a).

The Court of Appeals properly rejected each purported justification. With respect to factionalism, the Court of Appeals held that the "state has no interest in regulating political parties for the purpose of helping them win or retain voter support" (I App. 40a). *See also id.* at 47a (the state has "no legitimate interest in protecting political parties from disruptions of their own making"). As the Court of Appeals explained, this Court's decision in *Tashjian* makes it "resoundingly clear" that "the First Amendment forecloses paternalistic state action designed to protect parties from choosing rules of governance that may prove to be harmful to party interests" (I App. 38a).

The state's purported interest in minimizing the influence of party leadership and preventing voter confusion during the primary process was likewise rejected as constitutionally inadequate. Once again relying on *Tashjian*, the Court of Appeals cautioned that "'[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism'" (I App. 50a-51a). The Court of Appeals

accordingly rejected appellants' argument that "denying voters access to the views of party leadership somehow enhances their First Amendment rights," emphasizing instead this Court's repeated pronouncements of its "'faith in the ability of individual voters to inform themselves about campaign issues'" (I App. 50a, *quoting Tashjian*, 107 S. Ct. at 552).

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

In urging plenary review by this Court, appellants argue that the Court of Appeals misapplied *Tashjian* and that the provisions of the California Elections Code invalidated below are different from the Connecticut closed primary system in three assertedly significant respects. First, appellants contend that, unlike the statute invalidated in *Tashjian*, the challenged provisions of the California Elections Code do not conflict with the parties' bylaws and are necessary to enable the parties to enforce their rules in state court. Second, appellants contend that California's asserted interest in promoting the stability of its governmental system is different from the state interest advanced in support of the Connecticut closed primary system. Third, appellants contend that the challenged Elections Code provisions do not substantially burden political parties' first amendment rights because the parties can opt-out of the California primary system and qualify their candidates as independent candidates on the general election ballot.

Each of these purported grounds for review is contrary to the record below and the controlling authorities, including this Court's decision in *Tashjian*. None presents a question warranting plenary review by this Court.

A. The Purported Absence of a Conflict Between the Parties' Bylaws and the Challenged Elections Code Provisions Is Immaterial

1. Plaintiffs' Uncontroverted Declarations Demonstrated that California Political Parties Are Opposed to Elections Code Regulation

Appellants argue that this case presents an issue that is not addressed in *Tashjian* — whether a political party's first amendment rights are substantially burdened by statutes that do not conflict with party rules and bylaws and accordingly represent acts of political self-governance (Juris. Stmt. 19). That glib assertion was raised and properly rejected below.

As the Court of Appeals correctly observed, unlike the statutes invalidated in *Tashjian*, the Elections Code provisions invalidated below themselves prescribe the rules for internal party governance. Plaintiffs' failure to enact inconsistent rules in the face of this controlling legislation is therefore irrelevant (I App. 20a-21a).

Moreover, contrary to appellants' misleading suggestion, plaintiffs' declarations in support of summary judgment demonstrated that the parties are fundamentally opposed to Elections Code regulation prescribing the composition of their state central committees and prohibiting their ability to endorse candidates in primary elections. As the Court of Appeals found, these declarations establish that the plaintiffs "would reform the composition of their parties' central committees if the statutes were invalidated," and "would make preprimary endorsements if the practice were not prohibited" (I App. 23a). That finding is amply supported by the record below (*see, e.g.*, Christman Dec. ¶¶ 2-5, 13-15, Add. A at 2a-3a, 6a-7a; Coffey Dec. ¶ 4, Add. B at 11a; King Dec. ¶¶ 2-6, 12, Add. G at 37a-39a, 41a; Post Dec. ¶¶ 2-6, 14, Add. I at 46a-48a, 51a; Romero Dec. ¶¶ 2-9, Add. K at 57a-59a).

Plaintiffs' declarations further established that both the California Democratic and Libertarian parties have attempted unsuccessfully to obtain amendment of the challenged restrictions on internal party governance (Coffey Dec. ¶¶ 7-9, Add. B at 12a-13a; Gingell Dec. ¶¶ 5-6, Add. E at 25a-26a). For example, appellees' uncontroverted declarations demonstrated that

> [w]hen the Libertarian party qualified for the ballot, it was forced to jettison its "preferred and natural" party organization and replace it with one already mandated for one of the existing qualified parties. After adopting the rules of the Peace and Freedom Party as the least objectionable interim model, the Libertarians drafted a body of rules specifically tailored to their party's distinctive needs. When presented to the legislature, the proposed rules languished and died in committee. Thus, the Libertarian party has been compelled by the state to organize itself in a way considered inimical to its political interests.

(I App. 31a-32a) (citations and footnote omitted).

Similarly, although not a named plaintiff, the California Democratic Party has been on record since December 1984 as being fully supportive of this lawsuit in all its causes of action and has indicated its intention to join the litigation at the earliest available opportunity (Kelly Dec. ¶¶ 7-9 & Ex. A, Add. F at 30a, 32a; Supp. Kelly Dec. ¶ 5, Add. M at 64a-65a). In addition, all plaintiff county central committees, which include representative Democratic and Republican county central committees, are on record in opposition to the Elections Code provisions challenged herein (I App. 23a).[7]

---

[7] The only purportedly contrary evidence proffered below or cited in appellants' Jurisdictional Statement is the Rodda Declaration (II App. 105a). That declaration does not address unsuccessful efforts to change Elections Code regulation of political parties, including the unique problems of the Libertarian party, but merely states that where legislative changes in the "structure and procedures of the major political parties" have occurred, they were enacted "at the request and with the concurrence of the party affected" (Rodda Dec. ¶ 6, II App. 106a). The Rodda Declaration does not establish or imply, as appellants suggest, that the parties "have chosen the policies reflected in the invalidated statutes as their own in pursuit of their own interests" (Juris. Stmt. 19). At all events, the Court of Appeals correctly noted that "[e]ven if no party at the present time wished to adopt rules in conflict with the statutes, the State's interest in preventing any party from doing so in the future would hardly be considered either compelling or even legitimate under *Tashjian*" (I App. 37a).

Thus, even if appellants were correct in contending that the statutes were initially enacted at the request of the parties (Juris. Stmt. 19), that alleged fact is of no significance where the uncontroverted record below establishes that the parties are now opposed to Elections Code regulation. *See Tashjian*, 107 S. Ct. at 547 (noting that Connecticut Republican party initially supported closed primary system).

2. California Political Parties Have Adopted New Rules that Depart from the Invalidated Elections Code Provisions

Appellants assert that after this Court's December 4, 1987, denial of appellants' motion to stay mandate, the California Democratic and Republican parties took action to "restore protection of the parties lost by the invalidation of Elections Code § 11702" (Juris. Stmt. 17). Appellants further assert that neither political party has adopted any amendments to its bylaws to effect organizational or procedural changes (*id.* at 18). Appellants appear to argue that California political parties do not desire either the right to endorse or the right to control their internal rules and procedures. Appellants' argument is based upon unwarranted inferences from drafts of bylaws changes, and is totally undercut both by the uncontroverted record below demonstrating the unequivocal and strongly held desire of all plaintiff county central committees, and of the California Democratic and Libertarian parties, to be free from state

regulation, and by California political parties' recent actions to exercise their first amendment rights.[8]

Following this Court's denial of appellants' motion to stay mandate, the California Democratic Party adopted a final set of endorsement procedures for the June 1988 primary elections (Kelly Dec. ¶¶ 3-8, Add. Q at 93a-95a). On February 20-21, 1988, pursuant to these procedures, the Democratic Party held 16 regional pre-endorsing conferences around the state in which county central committee members evaluated Democratic candidates running for local partisan offices such as United States Congress, State Senate and State Assembly (*id.* ¶ 9 at 95a). The Democratic Party, at its March 20-21, 1988 annual convention, issued final endorsements in over 125 separate Democratic primary contests for the offices of United States Senate, United States Congress, State Assembly, and State Senate (*id.* ¶ 10 at 95a). Moreover, now that the Democratic party has successfully implemented its preprimary endorsement procedures, it is moving forward to review and revise the bylaws concerning the composition of its state central committee (*id.* ¶ 13 at 96a).

The California Libertarian Party similarly exercised its right of endorsement at its annual convention, held on February 12-15, 1988 (Hinkle Dec. ¶ 5, Add. P at 91a).

The California Republican Party also has moved to exercise its first amendment rights. At its annual convention, held February 19-21, 1988, the Republican Party amended its bylaws

---

8 Appellants have submitted new matter not included in the record below (I App. 70a-86a). The drafts of party bylaws submitted by appellants are not the final versions, nor are appellants' inferences therefrom accurate. In order to present this Court with an accurate record, appellees submit herewith declarations from the chairs of the California Democratic and Libertarian parties and from the general counsel of the California Republican Party describing the parties' final actions following issuance of mandate by the Court of Appeals (Add. O-Q at 72a-92a).

to reform the composition of its state central committee (Bell Dec. ¶ 9, Add. O at 74a). Although the California Republican Party adopted bylaws prohibiting endorsements in contested primary elections for designated partisan elective offices, this action does not constitute a blanket ban on endorsements (*id.* ¶¶ 5-7 at 73a-74a).[9] More importantly, as the Republican Party's general counsel points out, the recently adopted rules reflect the Republican Party's policy decision as to what is in its best interests at the present time, and should not be construed to mean that the party desires the kind of government regulation mandated by the Elections Code provisions invalidated below (*id.* ¶ 8 at 74a).

3. *California's Asserted Interest in Judicial Enforcement of Political Party Rules Is Not a Sufficient Justification for Regulating the Content of those Rules*

Appellants make the further assertion that the challenged statutes serve a compelling state interest by allowing political parties to enforce their rules in state court (Juris. Stmt. 13, 21). That purported justification for Elections Code regulation sweeps too broadly. As the Court of Appeals observed, even if appellants could establish a compelling state interest in judicial enforcement of political party rules, which they have not done, appellants have failed to show that it is also necessary to prescribe the content of those rules (I App. 38a n.26) (statute simply providing for judicial enforcement of party rules would be a less restrictive alternative). *Cf. Tashjian*, 107 S. Ct. at 550 (statute must be "narrowly tailored").

---

9 Endorsements are permitted in special elections and in uncontested races for partisan elective offices. Moreover, the present prohibition on endorsements in contested partisan races can be suspended by a 2/3 vote of the Republican State Central Committee (Bell Dec. ¶ 7, Add. O at 73a-74a).

B. California's Asserted Interest in Promoting the Stability of Its Governmental System Does Not Justify the Challenged Restrictions on Political Parties' Speech and Internal Governance

Appellants assert that this Court's decisions in *Storer v. Brown*, 415 U.S. 724 (1974), and *American Party of Texas v. White*, 415 U.S. 767 (1974), recognize a compelling state interest in creating "umbrella parties" to promote "stability of its governmental system and the democratic management of the internal affairs of its ballot-qualified parties" (Juris. Stmt. 19). Appellants urge that plenary review is necessary because the Court of Appeals failed to accord proper deference to these asserted justifications for Elections Code regulation.

Contrary to appellants' contention, this Court has never held, absent action by political parties in derogation of the constitutional or civil rights of party adherents or the electorate in general, *cf. Smith v. Allwright*, 321 U.S. 649 (1944), that the state has an interest in the "democratic management" of internal party affairs. *See generally Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 124 ((1981). *See also Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 424 U.S. 933 (1976) (rejecting challenge to Republican National Party's formula for allocating delegates at its national convention). *American Party of Texas v. White* simply notes in dictum that "the party nominating convention process is unrelated to ballot qualification and corresponds more to the democratic management of the political party's internal affairs." 415 U.S. at 783 n.15. Even assuming that this Court were now inclined to recognize a previously inchoate interest in democratic party governance, appellants have failed to demonstrate that the Elections Code provisions invalidated below in any way promote party democracy.

There is a similar failure of proof with respect to the asserted interest in the stability of the state's governmental system, which

purportedly arises under *Storer*. The uncontroverted record below established that the candidates, not the parties, run the general election campaign (*see, e.g.*, Supp. Layson Dec. ¶ 7, Add. H at 44a). Although appellants argue that under California law the duty to run the general election campaign belongs to the central committees (Juris. Stmt. 10-11), plaintiffs' declarations demonstrated that the Elections Code prohibition on preprimary endorsements has created a political vacuum that each candidate's individual campaign has been left to fill. As the Court of Appeals recognized, "each candidate forms an ad hoc committee to run his primary campaign and, if he is successful, that committee goes on to run the general election campaign independently of the party organization" (I App. 47a). There is accordingly no factual linkage between the challenged Elections Code restrictions and the state's asserted interest in preserving the integrity of the general election.

Moreover, the interest recognized as compelling in *Storer* is limited to the orderly conduct of the general election campaign. That interest does not extend to restrictions on political parties' speech during the primary election campaign or to restrictions on the conduct of internal party affairs unrelated to the general election campaign. As the Court of Appeals correctly observed:

> To be sure, in *Storer* the Court recognized that a state has a compelling interest in "the stability of its political system." 415 U.S. at 736. But, as the Supreme Court pointed out in *Tashjian*, "[t]he statute in *Storer* was designed to . . . prevent the disruption of political parties from without, and not, as in this case, to prevent the parties from taking internal steps affecting their own process for the selection of candidates." *Tashjian*, 107 S. Ct. at 553-54.
>
> This distinction between disruption from within and disruption from without, which the Court so clearly delineated in *Tashjian* as a basis for distinguishing *Storer*, is the distinction that the State fails to come to grips with in this case.

* * * * *

> [*A*] *state's interest is in orderly elections, not orderly parties,* and it may regulate political parties only as an incident to regulating elections. . . . [C]ritical to the *Storer* holding was that California's disaffiliation provision *did not attempt to control intraparty feuding during the primary campaigns*. To the contrary the primary was recognized as the forum in which "contending forces within the party finally settle their differences." *Storer*, 415 U.S. at 735. . . . Nothing in *Storer* suggests that a state may preempt intraparty feuding to help the parties win elections.

(I App. 35a, 40a-42a) (emphasis added).

Appellants have repeatedly invoked the state's purported interest in protecting political parties against potentially debilitating internal disputes, both during the primary process and with respect to the selection of the parties' internal leadership, in seeking to justify the challenged Elections Code provisions. For example, appellants argue that Elections Code regulation limiting the parties' state central committee chairpersons to a single term that alternates between representatives of Northern and Southern California is necessary to avoid "sectional identification" and "unnecessary conflict" (Juris. Stmt. 15). As the Court of Appeals recognized, such arbitrary restrictions burden the parties' first amendment rights by "impair[ing] the parties' ability to commit their fortunes to experienced and successful leadership" (I App. 33a). *Tashjian* confirms that a state's generalized interest in governmental stability does not extend to paternalistic measures, like the Elections Code provisions invalidated below, designed to "protect[] . . . the Party against the Party itself." 107 S. Ct. at 554.

Tashjian holds that the first amendment protects the freedom to identify the people who constitute the party. The Court of Appeals correctly reasoned that *Tashjian* applies with equal force to state regulation of who may run the party (I App. 33a) and

how the party may best exercise its first amendment rights (I App. 47a). As this Court explained in *Tashjian*:

> The State argues that its statute is well designed to save the . . . Party from undertaking a course of conduct destructive of its own interests. But on this point "even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party." *Democratic Party of United States v. Wisconsin*, 450 U.S. at 123-124 (footnote omitted). The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution. "And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational." *Id.* at 124.

107 S. Ct. at 554 (footnote omitted).

C. Providing Ballot Access to Candidates Who Do Not Participate in the State-Run Primary Does Not Lessen the Burden Imposed by Elections Code Regulation of Ballot-Qualified Parties

Finally, appellants argue that since California provides ballot access independently of the closed primary system, Elections Code restrictions on the activities of parties that choose to become ballot-qualified do not infringe those parties' first amendment rights (Juris. Stmt. 20-21).

The problem with appellants' argument is that Elections Code regulation of ballot-qualified parties is so pervasive that, once ballot-qualified, a party is effectively foreclosed from obtaining access to the general election ballot by any means other than the primary election. For example, Elections Code sections 8500 and 9000 grant exclusive use to the names "Democratic Party of California" and "Republican Party of California," to those respective entities. There is no means provided for a party

voluntarily to renounce its status as ballot-qualified. So long as at least one candidate chooses to register for the primary election, with or without party sanction, and receives at least 2% of the vote for any statewide office, the party remains ballot-qualified. Cal. Elec. Code § 6430(a).

While in theory a ballot-qualified party could renounce the primary election and seek to qualify its candidates as independents on the general election ballot, *see* Cal. Elec. Code §§ 6830-6920, the Elections Code presents three major impediments to such an effort. First, a candidate will not qualify as an independent if he or she was registered at any time during the previous year as a member of a ballot-qualified party. Cal. Elec. Code § 6830(c). Second, an independent candidate is by definition "independent," and is not identified by party affiliation on the general election ballot, Cal. Elec. Code § 10210, thus limiting the political efficacy of such ballot access. Third, the party has no statutory control over who will register as a candidate in the party primary. *See* Cal. Elec. Code § 6490. A party choosing to forego the primary election may nonetheless find its candidate opposed on the general election ballot by a competing candidate, designated as the official party representative, who obtained ballot access through the direct primary.

A ballot-qualified party would realize no offsetting benefits by boycotting the state-sponsored primary election. The party's rules for internal governance would remain subject to the prescriptions of the Elections Code regardless of whether the party chose not to participate in the direct primary. *See* Cal. Elec. Code §§ 8500, 9000, 9600, 9750, 9955 (providing that "organization, operation, and functions" of California's ballot-qualified parties, including new parties, are subject to provisions of the Elections Code). Moreover, even though a ballot-qualified party had chosen to sit-out the direct primary, Elections Code section 11702 would still prohibit the party from opposing any "renegade" candidates who nonetheless sought nomination through the state-sponsored primary.

CONCLUSION

For all the foregoing reasons, appellees respectfully request that this Court summarily affirm the decision below or dismiss this appeal for lack of a substantial federal question.

Dated: March 30, 1988

JAMES J. BROSNAHAN*
CEDRIC C. CHAO
PAUL FLUM
MORRISON & FOERSTER
345 California Street
San Francisco, CA 94104-2105

Attorneys for Plaintiffs/Appellees

* Denotes Counsel of Record